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Friday, October 28, 2005

Negative rights and the United States Constitution

Wikipedia has a good short article on the distinction between negative and positive rights. "A negative right is a right, either moral or decreed by law, to not be subject to an action of another human being (usually abuse or coercion)." To use Justice Brandeis' famous phrase more broadly than he used it, negative rights are "rights to be left alone." All civilized legal systems beyond the village or tribal level have been systems of negative rights. For example, Anglo-American common law defines spheres of personal space which other persons must not invade -- especially spheres involving the body, residence, possessions, and property. The only way to create positive rights in traditional common law is to personally agree to them -- i.e. to make a contract.

The United States Constitution was drafted by people who, at least for amendments made before the 1930s, defined rights as negative rights. Thus, when the Constitution in the Fourteenth Amendment protects the "life, liberty, or property" and "equal protection of the laws" to "any person," it is referring to acts which government must *refrain* from doing, not to any positive duty of the government to act. The only time the government has a positive duty to act is when it has already deprived a person of liberty (e.g., prisoners, and arguably children compelled to attend public schools). Unfortuneately, the Court since the 1940s has departed sharply from this basci tenent of civilized law. It has read positive rights into the Constitution, thereby depriving citizens and other persons of negative rights to which we are entitled.

Posted by Nick Szabo at 10:49 AM

9 comments:

Mike Huben said...

Jury trials for civil and criminal cases (6th and 7th amendments) seem to be positive constitutional rights.

And the 9th amendment explicity decries your induction:
"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

A question: isn't it anacronistic to say "The United States Constitution was drafted by people who... defined rights as negative

Pages

- Home

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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rights."? Where do those people make the distinction, and how did they make the distinction if they were not aware of their own practices of positive rights, such as pensions for war widows?

3:33 PM

Nick Szabo said...

Good comments. Some brief answers:

The rights to jury trial and certain other such rights in the original Constitution and Bill of Rights that one might label "positive" rights are all *procedural* rights. They are rights necessary for the government to enforce negative rights against itself and between persons within its jurisdiction.

"rights...retained by the people" aren't any rights you can possibly imagine. They are natural and common law rights, which at that time were negative rights and procedural rights to enforce negative rights. Even modern courts have envisioned unenumerated rights (now categorized under substantive Due Process) as largely "rights to be left alone," and have rejected Roosevelt's call for positive rights.

Whether or not the founders had a special label for "negative rights" we can observe the constitutional and common laws of that time and observe that they were practically all negative rights and procedural laws to protect negative rights. Since by "rights" in the common law and Constitution they meant negative rights, they didn't need a special phrase like we do after Roosevelt's so-called "Bill of Rights," which are not natural or common law rights at all.

Pensions for war widows were statutory, not common law or natural rights, and can be interpreted as a matter of implied contract (contract, or more generally personal consent, being the only way in the traditional common law to create positive rights).

11:48 AM

Mike Huben said...

I fail to understand your explanation.

If you are describing rights as divided into positive and negative, do "procedural" rights make that a false dichotomy or should they be assigned to positive rights? (I realize this is a mu question, but I don't see another alternative. Please help me out here.)

Haven't modern state constitutions and courts instituted any number of positive rights, such as the right to an education? (Which is a VERY expensive positive right, costing tens of thousands of dollars per person.)

Wouldn't any public services, including public goods, be positive rights? Say coining money, post offices, post roads, common defence? Is bankruptcy a negative or positive right?

If "the constitutional and common laws of that time ... were practically all negative rights and procedural laws to protect negative rights", does that mean they were the only things considered rights, or is that a matter of what a society with a very low standard of living could afford? Or could it be that they simply wanted the positive rights at a more local level to prevent federal interference within the states?

Are natural or common law rights the only kinds or rights the authors of the Constitution knew of? Didn't they also create statutory rights such as patents? Didn't they recognize rights created by contracts? Didn't they recognize that common law rights were often modified by statute law?

If pensions for war widows were statutory, aren't modern positive welfare rights also statutory? I suppose you could take another view of the pensions as some sort of contract, but why couldn't you view any other positive right as a contract too?

Blog Archive

- ► 2018 (1)
- ► 2017 (3)
- ► 2016 (4)
- ► 2015 (3)
- ► 2014 (3)
- ► 2013 (3)
- ► 2012 (8)
- ► 2011 (12)
- ► 2010 (9)
- ► 2009 (29)
- ► 2008 (55)
- ► 2007 (47)
- ► 2006 (130)
- ▼ 2005 (44)
  - ► December (16)
  - ► November (5)
  - ▼ October (23)
    - Software patents paper
    - Supreme Court takes patentable subject matter case...
    - Automobile privacy
    - Are intellectual property rights natural?
    - Civil liberties in the forever war
    - Negative rights and the United States Constitution...
    - Patent law reform in the U.S.
    - Janice Rogers Brown
    - Blackberry e-mail injunction
    - Anti-phishing bills and "unauthorized access"
    - Patents and borders
    - A world of vouchers
    - New writing -- The Birth of Insurance
    - Manual of Patent Examining Procedure (MPEP)

Couldn't we also observe that the founders did not fully accept "rights to be left alone"? For example, there are any number which can be disregarded merely by "due process of law". Perhaps that means they did not accept the model of negative rights, but rather had a more pragmatic belief.

David Hume pointed out that private property is a monopoly granted and maintained by public authority at the public's expense. The same seems to be tru of pretty much any other right which is enforced. But the expense is not just the public cost of enforcement: it is also the opportunity cost to others denied that specific right and the negative externalities protected by that right. If costs to the public at large are made benefits to the rightholder, isn't that a positive right just as if the public had been taxed and the money given to the rightholder?

8:11 PM

Nick Szabo said...

To clarify, I am dividing *substantive* rights into positive and negative. Negative rights are "rights to be left alone" (using that term more broadly than Brandeis to include, for example, the tort of battery and the right to quiet enjoyment of one's property) against any other individual or corporate entity including governments. Positive rights imply positive dutie(s) to act among other persons. For example, the supposed right to be rescued is not a traditional common law right (despite strong utilitarian arguments in favor of it), because it is a positive right. Under traditional common law the only way to create positive rights was by personal consent, usually contract.

Procedural rights are there to protect natural, constitutional, and common law substantive rights (negative rights) and statutory rights (which are sometimes positive in nature).

Our topic is the U.S. constitution and how certain broad phrases in it ("rights...retained by the people," "life, liberty, and property," "privileges and immunities," "equal protection," etc.) are to be interepreted. I am stressing original meaning -- what the ratifiers in 1789-91 and the 1860's understood by these phrases. (The standard approach to interpreting almost any legal text, of course, is how the text was understood by those who were authorized to enact it into law).

Thus, under the U.S. Constituion we are somewhat protected against those who would use the law to impose on others duties to act by limiting the creation of positive rights to consent (especially contract) and democratically enacted statute. Courts may not impose positive rights by traditional common law or by interpreting the U.S. Constitution.

Obviously some states (largely long since the founding of the U.S.) and foreign nations have some more recently enacted positive rights, the "right to education" being the most common. The constitutions of communist countries were or are full of such supposed rights, which didn't prevent tens of millions of their citizens from starving to death due to government confiscation of food. Positive rights are an invitation for the government to violating negative rights on a very large scale.

Broadly worded positive rights are inherently ambiguous and socially destrucitve. What broadly worded positive rights actually mean has been the subject of acrimonious and endless debate (e.g. how much can New Hampshire cut taxes before the reduced funding to its schools violates that state's constitutional "right" to education, and who has standing to sue to overturn the tax cuts?)

Public services are not legal rights unless statutes have given citizens an action in court against the government if those services are not provided (or perhaps even if their provision falls below some standard of service). The post-Cold War trend is to expressly disclaim that any such positive rights are being created, since that would give the courts _carte blanche_ to prevent budget cuts when funding is more urgently needed elsewhere, and might even give rise to courts raising taxes as they did in New Hampshire.

Common law and natural rights are crucial for interpreting the meaning of the Bill of Rights because these were the the kinds of rights that motivated the passage of those Amendments (see Madison et. al.) In particular, the 9th Amendment refers to other kinds of common law or natural (and thus negative) rights that are not expressly enumerated in the other Amendments.

Your comment on the nature of property rights is interesting, but will have to be the topic for another day. The short answer is to read Locke, not Hume, and that common law property rights are natural rights, not arbitrary creations of the government. For

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example, patents and copyrights are not natural property rights, but real property and rights in tangible goods and negotiable instruments usually are. (Note that none of these rights originated in the modern state; for example negotiable instruments law was the creation primarily of medieval merchant guilds). The positivist view you impute to Hume was alien to the founders who strongly believed in common law and natural rights.

12:33 PM

Leviathan Rules said...

Brandeis (?) invoking Brandeis' name in discussion of natural rights – it's like invoking Aunt Jemima in a discussion of woman's suffrage. Do they make you read Hobbes or Locke anymore?....the "State of Nature"...even vaguely familiar...perhaps a sick day?

Brandeis ?

2:05 PM

Anonymous said...

young quirk constituent higher typing hygienists debrief socially timely negotiation neuropathy
masimundus semikonecolori

11:23 AM

Khia "Blaze" Martin said...

Im am a little confused on how to interpret negative and positive rights when it comes to the "right to work"...

how do you explain the "negative right to work" vs "the positive right to work"?

3:41 PM

nick said...

Negative right to work: right to mutually agree with an employer to work for them, without undue interference by a third party

Positive right to work: power to demand government require that an employer hire you.

10:30 AM

Russ said...

I think a helpful distinction between negative and positive rights is to substitute the terms liberties and entitlements. As a negative right I am at liberty to do or not to do something. Nobody can compel me. A positive right automatically places a duty on someone else to provide that which I am exercising as an entitlement. The latter being less freedom the former being more freedom. I think it is important to accept that the Constitution was written primarily as an enumeration of negative rights. However, that doesn't mean that there are no examples of positive rights in the Constitution. The framers exposed limited government, not the absence of government. For the most part any positive rights in the constitution are for the protection of individual liberties, ie negative rights.

6:59 AM

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